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Nos. 98-1753, 98-1754

IN THE

Supreme Court of the United States

CITY OF FORT SMITH,

Petitioner,

-and-

CITIES OF ALMA, DYER and VAN BUREN,

Petitioners,

v.

ALBERT KRANTZ, RON DECKER and DON SWEAT,
On Behalf Of Themselves and All Others Similarly Situated,

Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION

The questions presented in the Petitions for Writ of Certiorari submitted in this matter are not appropriate for review by this Court.[1/] The two Petitions contend that the Court of Appeals for the Eighth Circuit committed mere error in applying otherwise established principles of law in holding (1) that the anti-handbilling ordinances of the four petitioner municipalities violate the First Amendment to the Constitution, (2) that respondents were the prevailing parties in the action and therefore are entitled to attorneys' fees and expenses under 42 U.S.C. § 1988, and (3) that respondents had standing to challenge the ordinance of Dyer, Arkansas. The petitioners identify no conflict of authorities, either among circuits or with precedent of this Court, and they present no other "compelling reasons", Supreme Court Rule 10, for review by this Court. Consequently, certiorari should be denied.

STATEMENT OF THE CASE

The Facts Presented Below

The petitioners here are four neighboring Arkansas municipalities, each of which enacted a virtually identical ordinance outlawing the practice of placing handbills under the windshield wipers of cars parked on public streets.[2/]

[1/] Petitioners Cities of Alma, Dyer, and Van Buren, Arkansas jointly filed a Petition for Writ of Certiorari. Petitioner Fort Smith, Arkansas filed a separate Petition for Writ of Certiorari.

[2/] The ordinances of the Cities of Alma, Dyer, and Van Buren are set forth at pages 83a-91a of the Appendix

These same ordinances explicitly permit the distribution of handbills on private property, so long as the handbills are secured from being blown away (*i.e.* by placing them under the windshield wipers of cars).

Respondents challenged the four municipal ordinances in the United States District Court for the Western District of Arkansas, seeking declaratory and monetary relief on the grounds that the ordinances were unconstitutional on their face as well as applied and that they were enacted for a discriminatory purpose. After the district court rejected plaintiffs' motion for a judgment on the pleadings, and granted the municipalities' motions for summary judgment, plaintiffs appealed to the Eighth Circuit Court of Appeals. That court held that the ordinances were facially unconstitutional in that they suppressed significantly more speech than was necessary to achieve their purpose. Moreover, the court of appeals held that the municipalities failed to meet their burden to establish a connection between handbilling in the communities and "litter that impacts the health, safety, or aesthetic well being of the defendant cities." (19a-20a) Having found for the respondents on these grounds, the court of appeals did not address the

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to the Petition for Writ of Certiorari of Alma, Dyer, and Van Buren. Hereafter, unless designated otherwise, references to the appendix are to the appendix to the petition of these three municipalities and are made in the form "__a". The ordinance of the City of Fort Smith is set forth at page 71a-73a of the Appendix to the Petition for Writ of Certiorari of the City of Fort Smith. Designations to this appendix are made in the form, "Ft. Smith __a".

respondents' claims of discriminatory enactment and selective enforcement. (20a)

The action was initiated *pro se* in June 1995 by 206 individual members of the Twentieth Century Holiness Tabernacle Church,[3/] nearly fifty of whom had been arrested for distributing Christian literature in three of the four defendant municipalities. After successive amendments to the complaint, the district court certified the case to proceed as a class action. The named respondents here are the representatives of three separate sub-classes certified by the district court, which include those individuals who variously (a) had been arrested under the ordinances, (b) had been threatened with arrest under the ordinances, and (c) feared arrest under the ordinances.

In their efforts to "preach the gospel to every living person on the earth", Alamo Church associates engage in a practice they call "tracting", in which Alamo Church associates distribute Christian literature by placing it under the windshield wipers of parked cars. As a consequence of their practice of tracting, "[m]any people have gotten saved through literature left on vehicles or in establishments that wouldn't have heard the gospel if [the church associate] had just waited to see that person." As Don Sweat, one of the class representatives in this action, explained in his deposition, it was only after he had received a handful of Alamo Church tracts that he was able to go home and read

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[3/] This congregation has existed under several different names including the Gloryland Christian Church, Holiness Tabernacle Church, The Tony and Susan Alamo Christian Foundation, and Holy Alamo Christian Church.

them, "And that's what led me to come into the Church, hearing the gospel, and in turn accepting Christ as my savior and completely turning my life around. And I believe that if it hadn't . . . been for that, I'd have been dead a long time ago, the way my life was going." As another Alamo Church associate explained, "many people do read [the Christian literature], . . . we feel compelled to continue ministering to these people."

The Fort Smith ordinance, passed in 1981, and the Van Buren, Alma, and Dyer ordinances, passed in close succession in 1983, were enacted in response to the Alamo Church congregations' efforts to distribute literature in those communities, and were drafted in a manner that specifically targeted the congregants' practice of distributing gospel literature by placing it under the windshield wipers of parked cars. Thus, one Alamo Church associate explained that the handbill ordinances were "targeted directly at" the Tony and Susan Alamo Foundation, explaining that the ordinances were passed "after they had been to distribute literature out on the streets, on cars, or to people." Likewise, Roy Gean, III, an attorney who represented many of the individuals charged with violation of the ordinances, explained in his deposition that Fort Smith and the other municipalities, in passing the handbill ordinances, were, "limiting the distribution of this literature printed by the Alamo people." One newspaper article, printed on June 23, 1983 in the *Crawford County Bulletin* described the passage of the Dyer handbill ordinance as follows:

> The Dyer city council has passed an anti-handbill ordinance similar to those on the books in other Crawford County cities. The new ordinance forbids the distribution of

> unwanted handbills and calls for a maximum $500 fine for each violation, double the sum for each repetition. . . . Dyer is the headquarters of the Susan and Tony Alamo Christian Foundation whose members have frequently leafleted in the area to tell the public about the foundation's work. . . . Towns in Crawford County have passed strong anti-ordinance (sic) measures following complaints from residents that their homes and automobiles have been littered with Alamo handbills.

In his deposition testimony, John Ballantine, Mayor of Alma, admitted that the anti-handbill ordinance was passed in response to the distribution of literature by the Alamo Church associates and Mayor Fayette Peevey of Dyer equivocated when asked whether the handbill ordinance was enacted in response to the Alamo Church associates.

As with their enactment, the enforcement of the anti-handbilling ordinances was directed entirely at the Alamo Church associates. Fort Smith, Van Buren, and Alma all conceded that no one other than individuals affiliated with the Alamo Church congregations had ever been charged with violation of the ordinances.[4/] The numerous arrests of Alamo Church associates were for placing handbills under the windshield wipers of parked, unattended cars. During the course of the arrests, several of the arresting officers

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[4/] Plaintiffs acknowledge that there has not been an arrest or prosecution in Dyer under that municipality's anti-leafleting ordinance.

made derogatory comments regarding the arrestees and the literature that was being distributed.

Fort Smith City Attorney Wyman Wade acknowledged in his deposition that all of the individuals he has prosecuted for violation of the handbill ordinance were affiliated with the Alamo Church organizations. Van Buren City Prosecutor, Steven G. Peer, acknowledged that he has prosecuted individuals affiliated with Alamo Church organizations for violation of the handbill ordinance in Van Buren. Peer is also City Prosecutor for the City of Alma and he acknowledged having "prosecuted persons affiliated with Tony Alamo organizations for violation of the handbill ordinance in Alma, Arkansas." Although there is no record of any actual arrests or prosecutions under the handbill ordinance in Dyer, Dave McAdams was threatened with arrest in Dyer for violation of the handbill ordinance.[5/]

While Alamo Church associates were the only ones arrested and charged with violation of the handbill ordinances, they were not the only ones who distributed handbills by placing them on the windshields of parked cars in these Arkansas municipalities. Ray Hodnett, a defense attorney, testified that "no one else [other than Alamo Church associates] has been arrested for violation of this ordinance. I know that other people communicate or disseminate information in the same manner. Various Pizza Huts, and that sort of thing." Another defense attorney, Roy

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[5/] Dyer misrepresents the record below in asserting that there is no record support for the contention that individuals feared arrest in Dyer. Don Sweat, the class representative, identified Dave McAdams as an individual who had been threatened with arrest in Dyer.

Gean III, testified that he knew of pizza establishments that distribute literature by placing advertisements under the windshields of cars, that he personally had witnessed leaflets left on cars parked on public streets by a church not affiliated with the Alamo Churches, and that he has seen the handbills of small mom and pop stores on cars.

Fort Smith Police Corporal Ricky Sisson sought to explain away this selective enforcement by claiming that Fort Smith only enforces the regulation if it receives a complaint. One municipal official explained what was happening best, noting that while he finds Alamo Church literature "tremendously" objectionable, he "doubt[s] that [people] would have the same feeling toward Domino pizzas as they would towards the Alamo Foundation."

Incredibly, although the ordinances plainly do not make it unlawful to distribute handbills on private property if affixed so that they do not blow away, Alamo Church associates were repeatedly arrested for doing this. This repeated misapplication of the law reveals that the true purpose of the municipalities was to persecute the Alamo Church associates and to suppress their speech.

Although the municipalities assert that the handbill ordinances were enacted to prevent litter, the record was void of any showing that litter had increased, that the litter was caused by the handbilling, that the litter resulted in any increased cost or inconvenience to the city, or that any other means (such as enforcing anti-littering statues or purchasing additional trash cans) had been considered by each municipality. Indeed, all evidence in the record demonstrated that it was not the individuals who distributed the handbills who caused litter, if there were any, but rather that it was individuals who subsequently removed the handbills from the windshields and threw them to the ground

that caused the litter. Of the handbill ordinances, only the Alma ordinance included any statement of legislative purpose, and that statement does not refer to litter but rather complains of "the vast amount of handbills and other pamphlets being left on the public and private portions of the City of Alma, Arkansas." (85a, Section 6 of Alma Ordinance No. 83-3)

As one Alamo Church associate who participated in "tracting" explained, "We don't do any littering." This is because the Alamo Church associates place each tract under the car windshield wiper, where it stays until the intended recipient removes it. The associate asked at deposition, "Why not arrest the people that throw them on the ground? If I get a newspaper and I throw it on the ground, they don't arrest the newspaper company, they come to me. So I think that it should be the same with the gospel literature, put it in your vehicle or dispose of it or read it or whatever." Significantly, he noted, "many people do read it."

Mason Childers, the Van Buren Police Chief, testified that he was not aware of any littering problem in Van Buren caused by pamphlets throughout his entire career. He explained, "The only littering problem that I am aware of is there's been some times, and they're very far and few in between, is maybe at the edge of town someone will go out and dump maybe a truck load of old furniture or trash or something."

Indeed, all evidence demonstrated that it was not the handbillers who caused any litter. Gary Perry, a city council member in Alma in 1983 stated that the anti-leafleting ordinance was passed "[b]ecause of the problem of distributing literature on the windshields or whatever on people's vehicles and when they came out instead of taking those and putting them in their vehicles, they were just

throwing them all over the community of Alma. And, you know, Alma is a nice city. It will remain a nice city." Manford Burris, former Mayor of Alma, noted, "[b]ecause people would have a tendency, you know, to not even look to see whether it was an ad, a political ad, something from the [Alamo] Foundation, or anybody. They'd just, well — you know, throw it down on the ground and then we've got to clean it up, you know." Similarly, Alma Mayor John Ballantine explained, "Well, most people — I know myself, I drive a Corvette Sting-ray and I don't want people sticking stuff all over it. And if I don't want it, the first thing — my reaction is when I walk up there and it's on my car, I trash it. I throw it down on the pavement. Well, you get thousands of these put out there on a car lot or a parking lot or a church parking lot or wh[er]ever — the natural reaction of any person is that they're not going to read it. They're going to throw it down on the ground. Well, then what happens when the wind blows and you've got all of this stuff piled up, either on somebody's parking lot or out on the city street. But if, you know, now if you [hand] it to somebody, and I've read their literature — if you [hand] it to somebody, more than likely if they accept it, they're going to read it and they're going to put it in the car and take it with them, dispose of it later at, you know, at a convenient place."

The Proceedings Below

After several amendments to the Complaint and the subsequent class certification, plaintiffs brought a motion on October 18, 1996 seeking a declaratory judgment that the municipal ordinances were unconstitutional. Also on that date, Dyer, Alma, and Van Buren brought motions for summary judgment and for judgment on the pleadings and defendant Fort Smith brought a motion for judgment on the

pleadings.

By Judgment and Memorandum Opinion dated November 27, 1996 (34a-64a), the district court granted all of the municipalities' motions for judgment on the pleadings and denied plaintiffs' motion for declaratory judgment. Finding that the handbill ordinances left open alternate means for distribution by hand delivery and that the governmental interest in preventing litter was strong, the district court rejected plaintiffs' claim that the ordinances were unconstitutional. The district court further granted Dyer, Alma, and Van Buren's motions for summary judgment, finding that plaintiffs did not come forward with evidence of selective enforcement or discriminatory intent.

By Memorandum Opinion and Judgment dated July 30, 1997 (Ft. Smith 23a-29a), the district court granted a motion for summary judgment brought by Fort Smith, dismissing plaintiffs' selective enforcement and discriminatory purpose claims against Fort Smith. The court found that plaintiffs did not come forward with sufficient facts to support their claims against Fort Smith.

On August 28, 1997, plaintiffs timely filed their Notice of Appeal (81a) appealing the November 27, 1996 Order and Judgment and the July 30, 1997 Memorandum Opinion and Order.

In its opinion and order of November 30, 1998, the Eighth Circuit Court of Appeals held that the anti-handbilling ordinances were facially unconstitutional because they were not narrowly tailored as required by cases such as *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1980). As the court explained:

> While we have no difficulty in concluding that the inconvenience of having to dispose of

> unwanted paper, "is an acceptable burden, at least so far as the Constitution is concerned," *Bolger*, 463 U.S. at 72, that minor inconvenience is not even necessary in the present case because, like the householders in *Martin* and *Rowen*, those who do not wish to be left with handbills can quite easily notify distributors of that fact. As the Supreme Court reasoned in *Martin* and *Schneider*, defendants' goal of preventing litter can be accomplished by punishing the handbill distributors who defy such notices, as well as the "litterbugs" who choose to throw papers on the ground. *See Martin*, 319 U.S. at 147 ("A city can punish those who call at a home in defiance of the previously expressed will of the occupant."); *Schneider*, 308 U.S. at 162 ("There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the street.").

(18a) As an alternate basis for its decision, the court of appeals held that the municipalities had failed to come forward with evidence in support of the ordinances. The court explained, "[D]efendants have not established a factual basis for concluding that a cause-and effect relationship actually exists between the placement of handbills on parked cars and litter that impacts the health, safety, or aesthetic well-being of the defendant cities." (19a) Because the court of appeals found for plaintiffs on the grounds described above, it did not address respondents' additional arguments. As the court explained, "Having therefore determined as a

matter of law that the ordinances are facially invalid on overbreadth grounds, we need not address plaintiffs' remaining arguments on appeal concerning their claims of selective enforcement and discriminatory enactment." (20a)

In its Opinion and Order of November 30, 1998, the court of appeals also rejected Dyer's argument that the plaintiffs lacked standing to challenge that city's ordinance because no one had been arrested in Dyer. (8a-10a)

The municipalities' petitions for rehearing and suggestions for rehearing en banc were denied on January 29, 1999.

On April 13, 1999, the court of appeals granted, in part, respondents' motion for an award of attorneys fees and expenses under 42 U.S.C. § 1988 for legal services performed on the appeal.

REASONS WHY THE PETITIONS SHOULD BE DENIED

I. The Court Of Appeals Followed Well Established Precedent In Holding That The Anti-Handbilling Ordinances Are Unconstitutional

The court of appeals had "no difficulty" (18a) holding that the municipal ordinances were unconstitutional because the "minor inconvenience" of having to dispose of unwanted handbills, "is an acceptable burden, at least as far as the Constitution is concerned." (*Id.*) Moreover, the court held, even this burden can be further minimized by car owners who post a note in their windshield indicating that they did not want handbills (*id.*), just as homeowners post "no solicitation" signs on their property pursuant to *Martin* v. *City of Struthers*, 319 U.S. 141 (1939), or notify advertisers

that they do not desire certain mailings pursuant to *Rowan* v. *United States Post Office Department*, 397 U.S. 728 (1970); *see also Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983). This rule appropriately balances "the constitutional rights of those desiring to distribute literature and those desiring to receive it, as well as those who choose to exclude such distributors . . . ." (14a, *citing Martin*, 319 U.S. at 146-47.)

There is no basis for certiorari review here as the court of appeal's decision is firmly rooted in established Supreme Court precedent. Moreover, petitioners identify no conflict with authorities or other "compelling reasons" for granting certiorari. The court of appeals' decision is consistent with longstanding precedent holding that the peaceful distribution of political or religious leaflets is a fundamental right at the core of the First Amendment. *See McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334 (1995) (Ohio ban against anonymous campaign literature was unconstitutional as applied to leafletter); *Lee* v. *International Soc'y for Krishna Consciousness*, 505 U.S. 830 (1992) (leafletting at airports was constitutionally protected even where solicitation of funds was not); *Martin* v. *City of Struthers*, 319 U.S. 141 (1943) (city could not ban door-to-door distribution of religious leaflets); *Jamison* v. *Texas*, 318 U.S. 413(1943) (city could not ban distribution of religious leaflets under anti-solicitation ordinance even where leaflets included solicitation of sale of religious texts); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (city could not ban peaceful distribution in Catholic neighborhood of religious literature that virulently attacked the Catholic Church and religion); *Schneider* v. *New Jersey*, 308 U.S. 147 (1939) (leafleting could not be banned in order to prevent litter); *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938) (city could not

ban distribution of handbills).

The decision below recognizes the firmly established principle that government may not substitute its judgment for that of the recipient of a communication as to whether the recipient desires to receive it. In this regard, the decision vindicates the well-established rights of individuals to receive literature, as well as the rights of those who distribute it. (17a, *quoting Bolger*, 463 U.S. 60, 72 (1983) ("[W]e have never held that the government itself can shut off the flow of mailings to protect those recipients who might potentially be offended"); *see also Martin* 319 U.S. at 143-44 ("The ordinance . . . substitutes the judgment of the community for the judgment of the individual householder. It submits the distributor to criminal punishment for annoying the person on whom he calls, even though the recipient of the literature distributed is in fact glad to receive it."). In holding the municipal ordinances unconstitutional, the court of appeals simply followed the well established rule that restrictions on speech may not, "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1989); *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 808 (1984). Thus, the court of appeals' decision set forth no new rules and strayed from no established precedent. Rather, it is in good company with other similar cases such as *Schneider*, *Martin*, and *Bolger*. Accordingly there is no basis for granting certiorari here.

In their Petitions for Writ of Certiorari, the municipalities argue that banning the distribution of handbills by placing them under the windshield wipers of parked cars is a reasonable means to curtail litter. They further argue that the right to distribute handbills extends only to distribution to "willing" recipients, and the

municipalities conclude that in the absence of the automobile owner's explicit approval, it must be presumed that there is no willing recipient. These contentions, however, disregard fundamental precedent of this Court. Moreover, they utterly ignore the facts in the record in this case.

In *Schneider* v. *New Jersey*, 308 U.S. 147 (1939), this Court held that barring handbilling is not an appropriate means to curtail litter. As this Court stated:

> The motive of the legislation under attack . . . is held by the courts below to be the prevention of littering of the streets and, although the alleged offenders were not charged with themselves scattering paper in the streets, their convictions were sustained upon the theory that distribution by them encouraged or resulted in such littering. We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets.

* * *

> As we have pointed out, the public convenience in respect to cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution.

308 U.S. at 162-63.

This holding was explicitly reaffirmed in *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984), in which this Court upheld a municipal ordinance barring placement of signs on public property, and explicitly distinguished those facts from the facts presented in *Schneider*. In making this distinction, the Court explained that while the signs in *Vincent* were the direct cause of the aesthetic harm, it was improper to ban handbills as a prophylaxis to curtail litter because it was not the leafletters that caused the litter but rather the subsequent acts of those who litter. Thus, the *Vincent* Court stated:

> With respect to signs posted by appellees, however, it is the tangible medium of expressing the message that has the adverse impact on the appearance of the landscape. In *Schneider*, an antilittering statute could have addressed the substantive evil without prohibiting expressive activity, whereas application of the prophylactic rule actually employed gratuitously infringed upon the right of an individual to communicate directly with a willing listener. Here, the substantive evil – visual blight – is not merely a possible

> by-product of the activity, but is created by the medium of expression itself. In contrast to *Schneider*, therefore, the application of the ordinance in this case responds precisely to the substantive problem which legitimately concerns the City. The ordinance curtails no more speech than is necessary to accomplish its purpose.

Vincent, 466 U.S. at 810.

The municipal ordinances at issue here do precisely what *Schneider* and *Vincent* prohibit, they seek to curtail litter by restricting the distribution of handbills, rather than by enforcing legislation against littering. As the court of appeals below explained, because such an approach deprives even individuals who desire the literature and individuals who would not litter from receipt of the information, they, "suppress considerably more speech than is necessary to serve the stated governmental purpose of preventing litter." (18a)

Heffron v. *International Society for Krishna Consciousness*, 452 U.S. 640 (1981), provides no support for the petitioners because the specific limitation on handbilling in that case was narrowly tailored to achieve its purpose. *Heffron* upheld restrictions on handbilling along the midway of a state fair, requiring instead that the literature be distributed from a fixed point. The holding was based on the "special attributes" of the crowded state fair, 452 U.S. at 650, where there was a pressing need to address, "the flow of the crowd and demands of safety," *id.* at 651. The Court explicitly contrasted the particular exigencies required in the state fair with those of public streets. *Id.* As noted below, the municipalities here have made no factual showing

demonstrating any need to limit the distribution of handbills on the public streets, for the purpose of curtailing litter, or otherwise.

The municipalities seek to distinguish *Martin, Schneider* and *Vincent* on the grounds that those cases only held there was a right to distribute literature to willing recipients, and there are no willing recipients at unattended vehicles. Thus, the Cities of Alma, Dyer and Van Buren assert in their Petition that, "[T]he issue [in *Martin*] was whether the distributor could deliver the information to the homes of persons *obviously* willing to accept it." (Petition at 14 (emphasis added)). Of course, this Court made no ruling in *Martin* regarding how obvious one's willingness to receive literature needed to be. What *Martin* made clear, however, was that absent an indication to the contrary – such as by the posting of a no solicitation sign – it had to be presumed that the homeowner was willing to receive solicitations. 319 U.S. at 143-48.

In *Bolger* the postal service advanced an argument similar to the municipalities' contention that handbills may only be distributed to those who are "obviously" willing to receive them. The postal service suggested that the advertisers of contraception, "could send letters to the general public asking whether they would be willing to receive information about contraceptives, and send advertisements only to those who respond." This position, however, was rejected by the Court. As Justices Rehnquist and O'Connor explained in their concurrence, "First Amendment freedoms would be of little value if speakers had to obtain permission of their audiences before advancing particular viewpoints." 463 U.S. at 79-80 (Rehnquist, J. concurring).

Petitioners alternatively seek to avoid the import of

Schneider, *Martin*, and *Bolger* by contending that recipients of handbills are a "captive audience" and therefore the ordinances are permitted under *Lehman* v. *Shaker Heights*, 418 U.S. 298, 362 (1974). Of course, the recipients of the handbills are not a captive audience, as were the riders of the public buses in *Lehman*, because the recipients of the handbills may simply avert their eyes and discard the handbills. As this Court held in *Bolger*:

> The First Amendment 'does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectionable speech.' Recipients of objectionable mailings, however, may 'effectively avoid further bombardment of their sensibilities simply by averting their eyes.' Consequently, the 'short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least as far as the Constitution is concerned.'

Bolger, 463 U.S. at 72 (citations omitted).

The municipalities attempt to characterize the court of appeals decision as novel by contending that the decision effectively turns private automobile windshields into a public forum. This contention is very wide of the mark. First, public forum analysis applies to publicly owned property. *See Perry Education Association* v. *Perry Local Educators' Association*, 460 U.S. 37 (1983). The doctrine therefore is not applicable here in the manner urged by petitioners because the cars are private property (albeit parked on public streets, which are a public forum).

Second, the court of appeals' decision below no more

turns automobile windshields into a public forum than do the numerous cases preserving the right to engage in door to door solicitation have the effect of converting private homes into a public forum. Thus, *Martin* did not socialize neighborhood homes for the purpose of door to door solicitations. Rather, it reaffirmed the right of willing homeowners to receive solicitors and left it to unwilling homeowners to post a notice. The decision here does no more and no less than *Martin* in this regard. Similarly, even though this Court specifically held in *U.S. Postal Service v. Greenburgh Civic Association*, 453 U.S. 114 (1981), that a household mail box is not a public forum, the decision in *Bolger* explicitly rejected the idea that, "Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended." 463 U.S. at 72.

Indeed, the municipal ordinances at issue here each make specific provision for distributing handbills on private property so long as the literature is secured so as not to be blown away. Like the long-standing precedent permitting door to door solicitations, this portion of the ordinances does not make private property a public forum, and neither does the court of appeals' decision below.

As an alternate ground for its decision, the court of appeals held, "[D]efendants have not established a factual basis for concluding that a cause-and effect relationship actually exists between the placement of handbills on parked cars and litter that impacts the health, safety, or aesthetic well-being of the defendant cities." (19a) Such a factual basis for the municipal ordinances is required by cases such as *Turner Broadcasting System, Inc.* v. *F.C.C.*, 512 U.S. 622 (1994) and *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986). *See also Cornerstone Bible Church* v. *City of Hastings*, 948 F. 2d 464 (8th Cir. 1991) (requiring city to

come forward with facts to support zoning ordinances that excluded churches from commercial areas). As the Court in *Turner Broadcasting* explained:

> [I]n First Amendment cases . . . deference afforded to legislative findings does not 'foreclose [the court's] independent judgment of the facts bearing on an issue of constitutional law.' This obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo* or to replace Congress' factual predictions with our own. Rather, it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences on substantial evidence.

512 U.S. at 666 (citations omitted). Similarly, in *City of Renton* this Court held, "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." 475 U.S. at 52.

Although the municipalities asserted that the purpose of the ordinances was to curtail litter, respondents demonstrated that there was no factual basis for the municipalities' claim either that distribution of handbills caused litter or that the ordinances were directed at curtailing

litter.[6/] Thus, the municipalities did not submit any contemporaneous evidence reflecting the purpose of the ordinances or any inquiry by the municipalities to determine the nature, extent, or cause of the purported litter problem. Evidence submitted by respondents, including testimony from the Van Buren Police Chief, demonstrated that there was no litter problem at all. Additional evidence demonstrated that it was the recipients of the handbills, and not the distributors, who had caused any litter. Indeed, the Mayor of Alma admitted that when there are handbills on his car, his first reaction is to, "throw it down on the pavement."

Because the municipalities submitted no evidence to support the purported legislative purpose of the ordinances they must now resort to "logic" instead of the factual support required by *Turner Broadcasting* and *City of Renton*. Thus the Cities of Alma, Dyer, and Van Buren assert in their Petition for Writ of Certiorari:

> The problem addressed by the Ordinances was persons discarding handbills left under their windshields on private parking lots and public streets. It is logical to assume that the person discarding the handbill does not want it, and the best way to remedy the problem is to require the distributor to give it to the person who wants it.

[6/] As part of their discriminatory enactment and selective enforcement claims, respondents further demonstrated that the *true* purpose of the ordinances was to silence the religious and political message of the Alamo Church associates.

(Petition at 15)[7/] The trouble with such "logic", of course, is that it ignores the most common and logical scenario: the recipient desires the literature, reviews it, and then having taken in the information presented, discards the literature. The constitutional solution to the problem of a recipient of literature who then litters is enforcing the anti-littering statutes, not restricting the recipient's access to the literature. The failure by the municipalities to conduct any factual inquiry into the nature or extent of the purported littering problem or to make any inquiry into the various means available to the municipalities to address the purported problem dooms the ordinances because it demonstrates that each municipality failed, "in formulating its judgments . . . [to] draw[] reasonable inferences on substantial evidence." *Turner Broadcasting*, 512 U.S. at 666.

Because the petitioners identify no grounds for issuing a writ of certiorari and because the court of appeals' decision was firmly grounded in established precedent, the Petitions should not be granted.

II. The Court Of Appeals Appropriately Awarded Attorneys Fees And Expenses To Respondents As The Prevailing Parties Below

The petitioners identify no basis for granting their Petitions for Writ of Certiorari to review the court of appeals' award of attorneys fees. Petitioners rely upon the case *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980), but that

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7/ The City of Fort Smith does not address this alternate holding of the court of appeals anywhere in its Petition for Writ of Certiorari.

case strongly supports the award of fees by the court of appeals. The Petitions on this ground are frivolous and commit the further vice of causing respondents to incur yet additional fees to respond to it here.

42 U.S.C. § 1988 provides for an award of attorneys fees and costs to a "prevailing party" enforcing the provisions of section 1983. Here, respondents were the prevailing parties as evidenced by the court of appeals' ruling which held the challenged ordinances facially unconstitutional. One measure of respondents' success was the court of appeals' decision not to address respondents' additional arguments that the ordinances were enacted for a discriminatory purpose and enforced in a selective fashion.[8/] It was unnecessary for the court of appeals to resolve these issues because, in holding the ordinances unconstitutional, the court gave respondents complete relief.

Relying upon *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980), the petitioners assert that an award of attorneys fees was inappropriate here because there has not yet been a final determination in favor of respondents. This contention, however, belies a fundamental misunderstanding of the import of the court of appeals' decision which held, on the merits, that the municipal ordinances were unconstitutional.

The City of Fort Smith asserts in its Petition, "[T]he respondents here succeeded only in having the district

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[8/] The court of appeals stated: "Having therefore determined as a matter of law that the ordinances are facially invalid on overbreadth grounds, we need not address plaintiffs' remaining arguments on appeal concerning their claims of selective enforcement and discriminatory enactment." (20a)

court's granting of summary judgment reversed and having the case remanded back to the district court, presumably for a full trial of their cause." (Ft. Smith Petition at 24.) Similarly, the other municipalities contend, "Plaintiffs have essentially only been afforded the right to proceed to trial on the merits of their claims." (Alma, Dyer, Van Buren Petition at 22.) Other than a hearing for the amount of damages, however, there is nothing further to litigate here. Certainly, the court of appeals' decision bars the municipalities from again arguing to the district court that the ordinances are not unconstitutional.

For this reason, the decision in *Hanrahan* is readily distinguishable from the facts presented here. The appeals court in *Hanrahan* made no determination on the merits. Rather, it had overturned a directed verdict for the defendant and ordered a new trial. In contrast, here there has been a final determination as to the merits of the case and therefore attorneys fees are appropriately awarded to respondents as the prevailing parties. As the Court in *Hanrahan* explained:

> It is evident also that Congress contemplated the award of fees *pendente lite* in some cases. But it seems clearly to have been the intent of Congress to permit such an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal. The congressional Committee Reports described what were considered to be appropriate circumstances for such an award by reference to two cases . . . . In each of those cases the party to whom fees were awarded had established the liability of the

> opposing party, although final remedial orders had not been entered.

446 U.S. at 757 (citations omitted). Thus, because respondents succeeded on the merits, the award of fees and expenses was proper.[9/] There is no basis for issuing a writ of certiorari.

III. The Court Of Appeals Correctly Determined That Respondents Have Standing To Challenge Dyer's Handbilling Ordinance

The City of Dyer argues that because no one has

[9/] The municipalities seemingly base their argument, in part, upon a strained reading of the notice of appeal from the original orders of the district court. They argue that the respondents here only appealed from a portion of each of the district court's orders, specifically those portions which granted the municipalities' summary judgment motions, and not from the denial of respondents' motions below. This however was not the municipalities' view of the respondents' appeal in their briefs to the court of appeals. The municipalities directly addressed respondents' facial challenge to the ordinances and never suggested that this challenge exceeded the permissible scope of the appeal. Indeed, in its "Statement of the Case", Fort Smith explained that, "Initially, Appellants present a facial challenge to the constitutionality to the Fort Smith ordinance." This argument therefore was waived and comes too late on a Petition for Writ of Certiorari.

actually been arrested under its handbilling ordinance, the respondents do not have standing to challenge the ordinance. One of the sub-classes certified below was those individuals who had been threatened with arrest under the ordinances and another was those individuals who feared arrest under the ordinances.[10/] Both of these subclasses have standing to challenge Dyer's ordinance.

In *Virginia* v. *American Booksellers Association, Inc.*, 484 U.S. 383 (1988), this Court held that plaintiff booksellers had standing to bring a pre-enforcement facial challenge to a statute which made it unlawful for sellers to

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[10/] Dyer contends that there was no evidence of anyone having been threatened with arrest in that community. The deposition testimony of Don Sweat, however, demonstrates that Dave McAdams was threatened with arrest in Dyer for violation of the handbill ordinance. This testimony was included in Appellants' Appendix at page AP239 and was relied upon by the court of appeals in making its decision (8a). Although Dyer included a portion of Mr. Sweat's deposition testimony in its Appendix to the Petition for Writ of Certiorari (95a-99a), this particular portion of the deposition testimony was excluded. The deposition testimony of Don Sweat states, in part, as follows:

> Q: Who has been threatened with arrest in Dyer?
>
> A: I'm still looking into that, but at present, Dave McAdams.

Deposition of Donald Ray Sweat at 72.

knowingly display sexually explicit material that was accessible to juveniles. The Court was "not troubled by the pre-enforcement nature of th[e] suit" noting that "plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them." 484 U.S. at 393. The Court noted that because the defendant State had not suggested that the newly enacted law would not be enforced, it saw no reason to assume otherwise. *Id.*

There is ample evidence of respondents' standing here. Contemporary newspaper reports stated that Dyer's ordinance was passed in response to the distribution of literature by Alamo Church associates. Moreover, Dyer's vigorous defense of the anti-handbilling ordinance is substantial evidence of the vitality of the ordinance in Dyer and that community's willingness to enforce it and the fact that respondents' religious beliefs compel them to violate the ordinance has not been questioned. Moreover, individual Church members testified to their actual fear of arrest in Dyer, (103a), and other testimony demonstrated that individuals were indeed threatened with arrest in Dyer.

Steffel v. *Thompson*, 415 U.S. 452 (1974), is directly on point. In *Steffel*, this Court explained that a plaintiff need not be placed "between the Scylla of intentionally flouting . . . [the] law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid being enmeshed in a criminal proceeding." 415 U.S. at 462. Similarly, respondents here should not be put in the position of risking arrest or foregoing their constitutional rights. As this Court explained in *Secretary of Maryland* v. *Joseph H. Munson Co.*, 467 U.S. 947 (1984), in the First Amendment context, the standing rule that courts should avoid constitutional adjudication whenever possible carries less weight because, "Even where a First Amendment challenge

could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity." 467 U.S. at 956. The Court noted that under such circumstances, "Society as a whole then would be the loser," and held, "[W]hen there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged." *Id.*

Thus, the court of appeals properly determined that respondents -- who by the very designation of the sub-classes by the district court are individuals who have been threatened with arrest or who fear arrest -- had standing to challenge Dyer's ordinance, and therefore there are no grounds for issuing a writ of certiorari here.

CONCLUSION

For the foregoing reasons, the Petitions for Writ of Certiorari should be denied.

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Respectfully submitted,

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